Supreme Court, U.S.
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No.

IN THE

# Supreme Court of the United States

ROBERT E. WRIGHT, SR., PETITIONER

*v.*

MONTGOMERY COUNTY; MONTGOMERY COUNTY COMMISSIONERS; MARIO MELE; RICHARD BUCKMAN; JOSEPH HOEFFEL; MAILLIE FALCONIERO; GEORGE FALCONERO

*PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether the Third Circuit decided an important and recurring issue of blanket evidentiary exclusion in employment discrimination cases in a manner that is in conflict with an earlier panel of the Third Circuit and the Eighth Circuit.

2. Whether the fundamental right of a fair trial was denied by the rulings of the court below in handing down 28 orders on the day of trial during the voir dire of the jury which blanketly excluded 27 witnesses from testifying on behalf of the Petitioner and prohibited the introduction of important testimony which supported and corroborated the Petitioner's claim that race was a determinative factor in his termination.

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## PETITION FOR WRIT OF CERTIORARI

Robert E. Wright, Sr., the Petitioner, respectfully prays that a writ of certiorari issue to review the opinion and order of the United States Court of Appeals for the Third Circuit entered in this case on January 14, 2004 and February 6, 2004, respectively.

## OPINIONS BELOW

The January 14, 2004 opinion and judgment of the United States Court of Appeals for the Third Circuit (Pet. App. 1a hereto) is unreported. The opinion of the United States Court of Appeals for the Third Circuit on the merits, which is sought hereby to be reviewed, affirmed the order of the United States District Court for the Eastern District of Pennsylvania decided on January 23, 2003 and entered on January 24, 2003 and the earlier orders (Pet. App. 28a hereto). The February 6, 2004 order of the United States Court of Appeals for the Third Circuit (Pet. App. 35a hereto) denied Petitioner's timely petition for panel rehearing and Petitioner's suggestion for rehearing en banc.

## STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on January 14, 2004. A timely petition for panel rehearing was denied on February 6, 2004. The jurisdiction of the Supreme Court is invoked Pursuant to 28 U.S.C. section 1254(l) and under Supreme Court Rule 10(a).

## RELEVANT PROVISIONS INVOLVED

42 U.S.C. §1981 provides in pertinent part:

**Section 1981. Equal rights under the law**

(a) All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*, provides in relevant part:

**§2000e. Definitions.**

For the purposes of this subchapter –

* * * * *

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees ... and any agent of such a person ...

**§2000e-2. Unlawful employment practices.**

(a) Employer practices
It shall be an unlawful employment practice for an employer -
(1) to ... discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin

## STATEMENT

This is an action seeking declaratory and damage relief based upon discrimination in terms and conditions of employment suffered by Petitioner due to his race, for being outspoken at the workplace about his mistreatment due to his race and for his retaliatory discipline and termination by the respondents on the basis of his race and retaliation.

This is an employment discrimination case under 42 U.S.C. §1981 . Petitioner was employed by respondent Montgomery County for 17 years, first through Montgomery County Redevelopment Authority and later at Department of Housing Services. He was eventually promoted to Director of Department of Housing Services of Montgomery County. He is the only Black employee to become a department head in Montgomery County.

The U.S. Department of Housing and Urban Development conducted an investigation of the Department of Housing Services of Montgomery County which concluded in a report that criticized Petitioner and

his department. Petitioner was terminated purportedly due to the report. Petitioner claimed that the reason(s) given for his termination was pretextual and that it was truly rooted in racial animus towards him by respondents and for his being outspoken at the workplace about his mistreatment and retaliatory discipline.

This action was specially listed for trial by the District Court for May 20, 2002, by Order dated April 15, 2002. ( Pet. App. 37a hereto) Prior to the start of trial, the parties had filed their various Motions in Limine with the Court in May, 1999 and October, 2001. On May 20, 2002, the parties began voir dire of the jury. The Court handed down 28 orders during the voir dire of the jury which drastically altered the proof that the Court was permitting to be presented to the jury. Among other things, the District Court (Pet. App. 6a hereto) excluded 27 of Petitioner's witnesses which had previously been identified and summarized in his Pretrial Memorandum.

The Third Circuit determined that the District Court "was very diligent in its management of this case" and exercised the appropriate standards of review in this case. The District Court, however, once issued an opinion as if this were a Title VII case; it is 42 U.S.C. §1981 case. During the trial, the District Court once admonished Petitioner's counsel for treating respondent Mario Mele as if he were on trial; he clearly was on trial, he was a named defendant.

The excluded witnesses would have corroborated the racially animus atmosphere in which Black employees had to work. Testimony should have been permitted by those Black employees who had complained to Petitioner about their mistreatment by county officials. The

testimony would have shown the disparated treatment that Petitioner received upon his suspension compared to that of a white employee. Testimony would have shown that white employees who violated the conflict of interest rules of the county received little, if any, disciplinary action. Testimony would have also shown that there was a long standing pattern of sending lesser qualified white job applicants to a department for job openings while more qualified minority job applicants were not.

The District Court prohibited questioning of the respondent witnesses in areas which would have revealed their racial animus and pretextual reasons for terminating petitioner. Respondent Mele should have been further questioned regarding the racial slurs by a county employee and political fund-raiser for the Republican party, against Petitioner and in the resulting disciplinary action. He should have been further questioned about his attendance at an annual luncheon called the "Horse Thieves Society" in which sexual and racial jokes were routinely told. See *Garvey v. Dickinson College*, 763 F.Supp. 799 (MD Pa 1991).

The inconsistency concerning conflict of interest of Respondent Mele goes to his credibility. He had violated county policy but was not disciplined. Additionally, he had permitted a campaign fund-raiser to be sponsored by a major county vendor. The District Court even tried to give the impression to the jury that Respondent Mele was not a defendant in this action and was, in fact, on trial.

Likewise, a chief county assessor was also found to have violated the conflict of interest provisions of the county policy with this same major county vendor, which had the contract to reassess the county, but only received

a minor reprimand.

The District Court prohibited follow-up questioning of Respondent Buckman concerning his involvement in the negotiations of the sale and purchase of the Spring Mountain ski resort in Montgomery County while he was a county commissioner and concluded after he left office, with him taking part or total ownership.

The District Court prohibited questioning of Respondent Hoeffel in many areas. Questioning should have been permitted about his long-term law partner, James Oliver. That would have permitted the exploration of Oliver's relationship with Lillian Ritts, who had filed an affidavit against Petitioner with the county detectives in effort to cause a criminal investigation. Likewise, he was not permitted to question his own conflict of interest as a member of Congress. He was one of the sponsors of Bill 1899, Justice for Victims of Terrorism Act in October-2000. This permitted be frozen Iranian assets to used to pay a $65,000,000.00 judgment that hostage Joseph Cicippio received from Iran. He was represented by James Oliver, his former law partner.

The District Court precluded certain of Petitioner's witnesses from testifying based upon its own determination, without explanation or stating its reasons, that the testimony was irrelevant or cumulative. The jury should have heard their testimony, seen exhibits to be introduced through them, weigh their credibility against other witnesses and determine its value on behalf of Petitioner.

The jury should have heard the witnesses as summarized in the Petitioner's Pretrial Memorandum.

The suspended assistant county solicitor was not escorted from his office by county security as Petitioner was, nor was there any public comment by the county commissioners about his suspension. The son of the Clerk of Courts was rehired after being convicted of theft by the same department in which the theft occurred. A former county personnel director was present when the racial slur was made against Petitioner. He would also testified about the hostile racial atmosphere in the county as it related to the hiring and placement of Black employees. He was instructed by the Chief Clerk not to send qualified minority job applicants to certain departments in the county and send lesser for qualified white applicants.

The head of county security was also prohibited from testifying. He would have testified about the lack of policy or procedure in the removal of an employee upon his suspension. He, however, received direct instruction concerning Petitioner and how he was to be removed from the premises. No such instruction was given to him after the suspension of the assistant county solicitor.

The District Court also precluded the testimony of former County Commissioner Jon Fox. He would have corroborated Petitioner's testimony regarding Respondent Hoeffel's vendetta against him. He would have also contradicted Respondent Mele's testimony concerning the Horse Thieves Luncheon and the racial jokes told there.

The staff that work with Petitioner was blanketly excluded from testifying. Each would have testified as to their particular function and responsibility and Petitioner's supervision of them. They would have

disputed the HUD audit report. They would have testified about his job performance and that it was in compliance with applicable regulations.

Two Black employees were also prohibited from testifying. Both were EEO officers for the county. Both had also complained of their racial mistreatment to Petitioner and others.

The jury was also not permitted to hear the testimony of the County Sheriff, an elected row officer, who made public racial slurs.

Michael Marino, one of the witnesses that Petitioner had wanted to call, among other things, would have testified that he was the District Attorney of Montgomery County and was later a County Commissioner. He would have testified that he called a meeting with the county commissioners and their solicitor regarding an investigation being conducted by the district attorney's office concerning Petitioner. At that meeting, he told them not to interfere with his detectives or any ongoing investigation. As a witness, his credibility and conflicts of interest would be tested by his own conduct. He would have testified that he notified a good friend that a drug search was about to be executed on his home; this was during the time that he was the District Attorney. He also would have testified that during the time he was a County Commissioner, he benefited greatly from the horse running trails on public grounds near his own personal property and horse stable. As County Commissioner, he appointed his personal physician as the director of the department of health services and his personal attorney as the county solicitor. In direct contradiction to county anti-nepotism policy, he had his

good friend, Bruce Castor, County District Attorney, hire his son as a county detective.

This is what the District Court prevented the jury from hearing.

The cumulative prejudicial effect of the numerous errors made by the District Court make it clear that substantial justice was not done and that Petitioner would not receive a fair trial. A different result would probably follow a new trial. The errors or defects relating to the reception or exclusion of evidence relating to witnesses is of such a character sufficiently prejudicial to require or justify the granting of a new trial.

The preclusion of certain witnesses prevented theirs and other witnesses' credibility from being tested before the jury.

## REASONS FOR GRANTING THE WRIT

### The Third Circuit has decided an important and recurring issue of blanket evidentiary exclusion in employment discrimination cases in a manner that is in conflict with the Eighth Circuit

Although acknowledged in *Quinn v. Consol. Freightways Corp.*, 283 F.3d 572 (3d Cir. 2002) that there is a judicial inhospitality to blanket evidentiary exclusion in discrimination cases, in the Third Circuit and other circuits, this case has now resulted in a conflict of different panels of the Third Circuit and a conflict with the Eighth Circuit. *Estes v. Dick Smith Ford, Inc.*, 856

F.2d 1097, 1103 (8th Cir. 1988); *Callanan v. Runyun*, 75 F.3d 1293 (8th Cir. 1996); *Jenson v. Eveleth Taconite Co.*, 130 F.3d 1287 (8th Cir. 1997). This conflict will result in confusion with the Third Circuit and among the other circuits.

The importance of resolving the conflict and setting a standard for all civil litigants, particularly those in employment discrimination cases, is far-reaching. The decision by the trial judge was wrong. It affected the outcome of the case. Had the jury been presented with all the critical evidence, it would have found that the proffered reason for Petitioner's termination was pretextual. Having had most of the critical witnesses prohibited from testifying and being precluded from developing and delving into various issues, without explanation, Petitioner was denied the opportunity for fair trial.

The District Court improperly undertook the role of passing upon and deciding issues of fact. It is the jury's function to determine the credibility of witnesses, to determine disputed facts, and to draw conclusions and appropriate inferences from doubtful and contradictory premises presented at trial. Where different conclusions and inferences can reasonably be drawn by reasonable minds from the same evidence, the question is one for the jury to decide, not the court. It is this very point, substantial conflict in the testimony, that falls squarely within the province of the jury. The District Court improperly invaded that province.

The District Court is given wide discretion in ruling on admissibility of evidence. However, in excluding testimony the court must look at the prejudice

or surprise in fact of excluding the witnesses who would have testified, the ability of the party to cure the prejudice and the extent to which this would disrupt the orderly and efficient trial of the case. *Meyers v. Pennypack Woods Home Ownership Association*, 559 F.2d 894 (3d Cir. 1977). These are the factors that the Third Circuit looks at in excluding testimony of an expert witness as a discovery sanction. No such sanction was called for in this case. The witnesses listed by Plaintiff had been known to the defendants for years, as well as the court. As in *Quinn, supra*, the blanket exclusion of testimony regarding factors critical to issues in the case is not supported by the record in this case. This clearly caused Petitioner to have proof problems in this employment discrimination case. The effect of the exclusion of witnesses on the morning of trial, made without advance warning to Petitioner, significantly limited the presentation of Petitioner's case and was an abuse of discretion by the trial court.

It is fundamental to our system of jurisprudence that the province of the court is to determine and decide questions of law presented at trial. It is also fundamental that the province of the jury is to decide or determine the facts of the case from the evidence produced. We guard and protect the province of the jury from an invasion by the court. To permit or disregard the province of the jury is to impinge on the right to a fair trial by jury. The District Court, on more than one occasion in pretrial orders, has stated that:

> "... The disputed causal connection and the credibility of the proffered explanation are, of course, issues that a jury must resolve. Wright has produced sufficient evidence for

> a reasonable jury to infer that race was a determinative factor in Plaintiff's termination."

Memorandum and Order of December 18, 1998 and February 25, 2002. It further stated, in its Memorandum and Order of February 25, 2002, that

> "... To discredit the employer's articulated reason, the plaintiff need not produce evidence that necessarily leads to the conclusion that the employer acted for discriminatory reasons, *Sempier v. Johnson & Higgins*, 45 F.3d 724, 728 (3d Cir. 1995), nor produce additional evidence beyond his prima facie case, *Fuentes*, 32 F.3d at 764. The plaintiff must, however, point to 'weaknesses, impossibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons [such] that a reasonable fact finder could rationally find them 'unworthy of credence" and hence infer that the proffered nondiscriminatory reason 'did not actually motivate' the employer's actions. *Simpson v. Kay Jewelers*, 142 F.3d 639, 644 (3d Cir. 1998)."

This is what the proffered testimony and other evidence would have done.

As in any civil case, it is for the jury to determine whether a claim is supported by a preponderance of the evidence. This is so very critical in this case. Where the evidence is contradictory testimony, the jury must decide,

in view of the other facts and circumstances in the case, where the preponderance of evidence lies. When a prima facie case has been made out by the plaintiff, the question whether or not it has been rebutted is for the jury. It is for them to determine what constitutes preponderance of the evidence. It is within their province to reconcile conflicting testimony and say which shall prevail. The delicate balance of the scales is so precarious that it is even more important that the court stay out of that area, so as to error on the side of caution, than to interfere in the name of streamlining justice and moving the case along.

In *Quinn*, at page 578, *supra*, the trial court excluded testimony of a key witness who would have corroborated plaintiff's testimony. The Third Circuit looked at the importance of the excluded testimony. There was no surprise as to the scope of the excluded witnesses' testimony; defendants knew quite well what their testimony in support of Plaintiff would have been. It was recognized that proof is often difficult in discrimination cases and the Third Circuit had adopted a "judicial inhospitability to blanket evidentiary exclusions". It was further "troubled" by the trial judge excluding the witness on the morning of trial, "made without advance warning to plaintiff's attorney." The exclusion was held to be an abuse of discretion. Accordingly, handing down 28 orders during voir dire would likewise be deemed an abuse of discretion and a new trial must be granted.

In *AMTRAK v. Morgan*, 336 U.S. 101 (2002), it was held that events which would have been normally time barred must be presented to the jury to show the existence of past acts and the knowledge of their prior occurrence. These occurrences can be used as background

evidence to support Plaintiff's claim. The entire time period can be considered for the purposes of determining liability. Petitioner was denied this opportunity. His witnesses would have shown the long history of racial animus in the County.

Discretion is clearly and prejudicially abused where the District Court excludes evidence of a critical nature, so that there is no reasonable assurance that the jury would have reached the same conclusion had the evidence been admitted. *First Sec. Bank v. Union Pacific Railroad Co.*, 152 F.3d 877 (8th Cir. 1998).

> **The fundamental right of a fair trial is denied when there is a blanket exclusion of witnesses and issues on the day of trial, without explanation, which would have been supportive and corroborative of a claim that race was a determinative factor in an employment termination case.**

The proper functioning of the federal judiciary is one of the primary responsibilities of the Supreme Court. Rule 10(a) recognizes that a grant of certiorari in cases involving practice and procedure is appropriate. The importance, novelty or difficulty of an issue can best be seen through its far reaching impact on all judicial proceedings. Identifying that a federal appellate decision "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court," demands exercise of this Court's supervisory power. The rulings excluding critical witnesses on the day of trial is such a departure.

Such supervisory power has been exercised in a number of categories. This Court exercised its supervisory authority in the administration of criminal justice in the federal courts, *McNabb vs. United States*, 318 U.S. 322 (1943); the construction of the federal rules of civil procedure, *Hickman vs. Taylor*, 329 U.S. 495 (1947). The exercise of supervisory power is also to accomplish the goal of uniformity of federal procedure. *Hanna v. Plumer*, 380 U.S. 460 (1965). Supervision is now necessary so that an ambush during voir dire is not permitted.

In determining what might demonstrate as a "departure" from the "the usual course of judicial proceedings," does not require that there be a failure to follow recognized rules and procedures. Indeed, this Court, in *Lexecom, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, at 32, (1998), reversed a long-standing practice embodied in a rule of the Judicial Panel of Multi-district Litigation. Direct that fair warning of evidentiary exclusion occur before the day of trial, and especially not during voir dire, is not usurping the trial court of the managing of its own courtroom.

As fundamental as the "gatekeeping" responsibilities of the trial judge regarding expert testimony under Federal Rules of Evidence 702 in *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), needed clarification from this Court, so do trial judges need guidance and supervision in the exclusion of witnesses and issues on the day of trial. Sanctions as result of discovery violations are clearly spelled out and known prior to the imposition of the sanction.

Although the conflict is now also within the Third Circuit, such conflicts are usually resolved en banc. An opportunity was presented to the Third Circuit to resolve this conflict. The Third Circuit did not respond or acknowledge that a conflict existed. One of the primary tasks of the circuit court is to reconcile its internal differences. *Wisniewski v. U.S.*, 353 U.S. 901 (1959). It is necessary for this Court to step in and clarify a procedure in which exclusion of witnesses on the day of trial does not result in manifest injustice to the affected party.

## CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court granted the writ of certiorari and the judgment below reversed.

Respectfully submitted,

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No. 03-1536

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ROBERT E. WRIGHT, SR.,
Appellant

v.

MONTGOMERY COUNTY; MONTGOMERY COUNTY COMMISSIONERS; MARIO MELE; RICHARD BUCKMAN; JOSEPH HOEFFEL; MAILLIE FALCONIERO; GEORGE FALCONERO

January 12, 2004,
Submitted Under Third Circuit Lar 34.1(a)
January 14, 2004, Filed

COUNSEL: For Robert E. Wright, Sr., Appellant: Theodore Q. Thompson, Blue Bell, PA. For County of Montgomery, Montgomery Cty Comm, Mario Mele, Richard Buckman, Joseph M. Hoeffel, Appellees: Timothy T. Myers, Elliott, Reihner, Siedzikowski & Egan, Blue Bell, PA. John M. Eliliott, Elliott, Reihner, Siedzikowski & Egan, Blue Bell, PA.

JUDGES: BEFORE: BARRY, SMITH, and GREENBERG, Circuit Judges.

OPINIONBY: Morton I. Greenberg

OPINION: OPINION OF THE COURT

GREENBERG,

Circuit Judge. This matter comes on before the court on the appeal of plaintiff Robert E. Wright, Sr. from an order entered in the district court on January 24, 2003, denying his motion for a new trial following a jury verdict for the appellees in this employment discrimination case. Wright characterizes this action as one "seeking declaratory and damage relief based upon discrimination in terms and conditions of employment [he] suffered . . . due to his race, for being outspoken at the workplace about his mistreatment due to his race and for his retaliatory discipline and termination by the Appellees on the basis of his race and retaliation." Appellant's br. at 2. In particular Wright was terminated as director of the Montgomery County, Pennsylvania, Department of Housing Services.

In his notice of appeal Wright indicates that he is appealing from numerous orders culminating in the order denying his motion for a new trial. In his brief, however, he summarizes the issues as follows:

I. Whether, in an action for retaliatory termination for speaking out against the County's racially discriminatory employment practices, the District Court abused its discretion by effectively precluding and denying [him] an opportunity to present critical evidence at trial by handing out 28 orders on the day of trial during the voir dire of the jury which prohibited 27 of [his] witnesses from testifying and prohibited the introduction of important testimony which supported and corroborated [his] case that race was a determinative factor in his termination.

II. Whether, in an employment discrimination action against a county and its elected county commissioners,

it was clear error for the District Court to dismiss [his] 42 U.S.C. § 1983 action for failure to state a cause of action.

III. Whether the District Court abused its discretion, during pretrial discovery, by permitting discovery abuses by Appellees and sanctioning [him] for requesting a discovery conference.

IV. Whether the District Court abused its discretion by sustaining the jury's verdict and not granting [him] a new trial.

Appellant's br. at 1-2.

He then summarizes his argument as follows:

In an otherwise routine employment discrimination case, the abuse of discretion by the District Court on the morning of trial, by handing down 28 orders on matters which had been outstanding for more than three years, requires that [he] be granted a new trial. The blanket exclusion of 27 of [his] witnesses without explanation or reasoning by the District Court deprived [him of] a fair trial. The excluded witnesses and issues rightfully should have been presented to the jury for them to weigh their credibility and probative value in assessing whether [his] termination . . . was racially based or business justified.

The District Court improperly dismissed the [42 U.S.C.] § 1983 claim by limiting it to a property right claim under [42 U.S.C.] § 1982.

The District Court erred when [it] sanctioned [him] for requesting a discovery conference with the District Court to cap the discovery abuse and wasteful discovery efforts of Montgomery County.

The District Court had full authority to set aside the jury verdict and grant [him] a new trial.Appellant's br. at 6.

The district court had jurisdiction under 28 U.S.C. §§ 1331, 1343(a), and 1367 and we have jurisdiction under 28 U.S.C. § 1291. Wright concedes that we review the various orders from which he appeals on an abuse of discretion basis except that we exercise plenary review over the district court's order granting summary judgment and dismissing his claim under 42 U.S.C. § 1983. We agree. See Evans v. Port Auth. of N.Y. and N.J., 273 F.3d 346, 351 (3d Cir. 2001) (reviewing order denying new trial on an abuse of discretion basis); Northview Motors, Inc. v. Chrysler Motors Corp., 227 F.3d 78, 87 (3d Cir. 2000) (exercising plenary review of order granting judgment); Walden v. Georgia-Pacific Corp., 126 F.3d 506, 516-17 (3d Cir. 1997) (stating that an abuse of discretion standard of review applies to admission of evidence); Newman v. GHS Osteopathic, Inc., 60 F.3d 153, 156 (3d Cir. 1995) (abuse of discretion standard in reviewing order with respect to sanction).

We have reviewed this matter and have examined the district court's comprehensive series of orders and dispositions from which Wright appeals. It is clear to us that the district court was very diligent in its management of this case and, exercising the appropriate standards of review, we find no error in its numerous dispositions. Accordingly, the order of

January 24, 2003, and the earlier orders from which Wright appeals will be affirmed.

/s/ Morton I. Greenberg

Circuit Judge

CIVIL ACTION NO. 96-4597

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROBERT E. WRIGHT, SR.

v.

MONTGOMERY COUNTY, et al.

May 20, 2002 Decided

COUNSEL: For ROBERT E. WRIGHT, SR., PLAINTIFF: THEODORE Q. THOMPSON, AMBLER, PA USA.

For MONTGOMERY COUNTY, MONTGOMERY COUNTY COMMISSIONERS, MARIO MELE, RICHARD BUCKMAN, JOSEPH HOEFFEL, DEFENDANTS: JOHN M. ELLIOTT, ERIC J. BRONSTEIN, TIMOTHY T. MYERS, ELLIOTT, REIHNER, SIEDZIKOWSKY AND EGAN, P.C., BLUE BELL, PA USA.

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For ANN HARTMAN, PIZONKA, MCGRORY, REILLY, BELLO & MCGRORY, P.C., MOVANTS: ROBERT J. REILLEY, JR., PIZONKA, BRADY, REILLEY & BELLO, KING OF PRUSSIA, PA USA.

For UNITED STATES OF AMERICA, MOVANT: MAUREEN BARDEN, U.S. ATTORNEY'S OFFICE, PHILA, PA USA.

JUDGES: HERBERT J. HUTTON, J.

OPINIONBY: HERBERT J. HUTTON

OPINION:
MEMORANDUM AND ORDER

HUTTON, J.

Upon consideration of Plaintiff's Pre-Trial Memorandum (Docket No. 52), Defendants' Supplemental Pre-Trial Memorandum (Docket No. 206), and the Motions in Limine filed by the parties to date, the Court issues the following Memorandum and Order.

## I. BACKGROUND

On June 25, 1996, Plaintiff Robert E. Wright, Sr. ("Wright" or "Plaintiff") brought this employment discrimination action against Defendants Montgomery County, Richard S. Buckman, Commissioner of Montgomery County and Joseph M. Hoeffel, III, Commissioner of Montgomery County ("Montgomery County Defendants" or "Defendants"). All that remains of the Plaintiff's complaint is a claim of retaliation for protesting against his own mistreatment for being a member of a racial minority brought under 42 U.S.C. § 1981.

## II. DISCUSSION

### A. Section 1981 Claim

Section 1981 provides in relevant part that:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. 1981(a) (1994). Although § 1981 has proven effective in battling discrimination, its scope is limited to cases of race discrimination. Saint Francis College v. Al-Khazraji, 481 U.S. 604, 613, 95 L. Ed. 2d 582, 107 S. Ct. 2022 (1987). Thus, these sections may only be invoked when discrimination is alleged against

"identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics." Id. "Congress amended § 1981 in 1991 to allow suits for workplace harassment. See 42 U.S.C. § 1981(b). "Accordingly, claims of a hostile working environment that arise after 1991 are ... actionable under § 1981." Simpson v. Martin, Ryan, Andrada & Lifter, 1997 U.S. Dist. LEXIS 23342, No. CIV.A. 96-4590, 1997 WL 542701, at * 3 (N.D. Ca. Aug. 26, 1997) (citations and footnote omitted). Retaliation claims are also actionable under 1981. Patterson v. Augat Wiring Sys., Inc., 944 F. Supp. 1509, 1519-21 (M.D. Ak. 1996); see Freeman v. Atlantic Ref. & Mktg. Corp., 1994 U.S. Dist. LEXIS 5345, No. CIV.A. 92-7029, 1994 WL 156723, at * 8 (E.D. Pa. Apr. 28, 1994) ("Section 1981's prohibitions against discrimination extend to the same broad range of employment actions and conditions as in Title VII."). n1

1. Retaliation

To make out a prima facie case of retaliation, the Plaintiff must show that: (1) he engaged in protected conduct; (2) his employer took adverse action against him; and (3) there was a causal link between the protected conduct and the adverse action. Kohn v. Lemmon Co., 1998 U.S. Dist. LEXIS 1737, Civ.A. No. 97-3675, 1998 WL 67540, *5 (E.D. Pa. Feb. 18, 1998) (citing Kachmar v. SunGard Data Sys., Inc., 109 F.3d 173, 177 (3d Cir. 1997)). Protected activity consists of opposition to conduct prohibited by Title VII or participation in an investigation of or proceeding regarding such conduct. See 42 U.S.C. § 2000e-3(a); Walden v. Georgia-Pacific Corp., 126 F.3d 506, 513 n.4 (3d Cir. 1997) (grievances about working conditions not

protected activity when they do not concern acts made unlawful by Title VII), cert. denied, 523 U.S. 1074, 118 S. Ct. 1516, 140 L. Ed. 2d 669 (1998); Sumner v. United States Postal Service, 899 F.2d 203, 208 (2d Cir. 1990) (Title VII "prohibits employers from firing workers in retaliation for their opposing discriminatory employment practices"). To establish the requisite causal connection, a plaintiff must proffer evidence "sufficient to raise the inference that [his] protected activity was the likely reason for the adverse action." Zanders v. National R.R. Passenger Corp., 898 F.2d 1127, 1135 (6th Cir. 1990) (citing Cohen v. Fred Meyer, Inc., 686 F.2d 793, 796 (9th Cir. 1982)). Plaintiff must also show that the persons who took the adverse employment action against him knew of the protected activity and acted with a retaliatory motive. Gemmell v. Meese, 655 F. Supp. 577, 582 (E.D. Pa. 1986).

After the plaintiff makes a prima facie showing, a presumption of retaliation arises that shifts the burden of production to the employer to rebut the prima facie case by producing "clear and reasonably specific" evidence that its actions were taken for legitimate, nonretaliatory reasons. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 258, 67 L. Ed. 2d 207, 101 S. Ct. 1089 (1981). If an employer meets its burden of articulating a non-retaliatory reason, the burden of production shifts back to the plaintiff, who "must have the opportunity to demonstrate that the proffered reason was not ... true." Id. at 256. The plaintiff's burden of production "merges with the ultimate burden of persuading the court that he has been the victim of intentional discrimination." Id. The plaintiff can meet the burden "either directly by persuading the court that a discriminatory reason more likely motivated the

employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." Id. (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804-05, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973)). If he successfully shows that a retaliatory motive played a motivating part in an adverse employment decision, the employer can nevertheless avoid liability by demonstrating by a preponderance of the evidence that it would still have taken the same action absent retaliatory motive. See Price Waterhouse v. Hopkins, 490 U.S. 228, 252-53, 104 L. Ed. 2d 268, 109 S. Ct. 1775 (1989); Berger v. Iron Workers Reinforced Rodmen, Local 201, 170 F.3d 1111, No. 97-7019, 1999 WL 169431, at *12 (D.C. Cir. Mar. 30, 1999).

B. Immunity

The Defendants are not immune from suit in this § 1981 retaliation claim. First and foremost, the Court is unaware of any court dismissing such a claim based on either absolute immunity or qualified immunity. Second, if this Court were to apply the rationale applied by courts to § 1983 claims to this case, the Court still finds that the Defendants' are not entitled to immunity. No Court has held that a local government is immune from a civil rights suit. The Supreme Court has held that local legislators are absolutely immune from suit under § 1983 for their legislative acts. See Bogan v. Scott-Harris, 523 U.S. 44, 118 S. Ct. 966, 970, 140 L. Ed. 2d 79 (1998). "Whether an act is legislative turns on the nature of the act, rather than on the motive or intent of the official performing it." Id., at 973. In Bogan, Mayor Bogan proposed a budget that froze the salaries of all municipal employees and eliminated one hundred thirty-five city positions. Id., at 969. As part of this

package, Bogan called for the elimination of the Plaintiff's position. Id. Because "the ordinance, in substance, bore all the hallmarks of traditional legislation," the Court granted absolute immunity without determining whether the character of the action was legislative. Id., at 973.

In the present case, absolute immunity does not apply, because the decision to terminate the Plaintiff as Director of Montgomery County Department of Housing Services ("MDHS") was not a legislative act. The Defendant Commissioners' decision to terminate the Plaintiff did not bear any of the hallmarks of traditional legislation. Moreover, the character of the Defendant Commissioners' actions does not entitle them to legislative immunity. This Court has found that a genuine issue exists as to whether the Defendant Commissioners terminated the Plaintiff from his position as Director of Montgomery County Department of Housing Services ("MDHS") because the Plaintiff complained of his mistreatment for being a member of racial minority.

Individual government officials engaged in discretionary functions enjoy qualified immunity from suits when "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Sherwood v. Mulvihill, 113 F.3d 396, 398-99 (3d Cir. 1997) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982)). The question is whether a reasonable commissioner in the Defendants' position could have believed their conduct was lawful in view of clearly established law and the information they

possessed. See Parkhurst v. Trapp, 77 F.3d 707, 712 (3d Cir. 1996).

In this case, a commissioner who takes retaliatory action against a subordinate for speaking out against his own mistreatment for being a member of a racial minority would be violating a clearly established right of which a reasonable commissioner would be aware. See, e.g., Watters v. City of Philadelphia, 55 F.3d 886, 892-93 (3d Cir. 1995); Bennis v. Gable, 823 F.2d 723, 733 (3d Cir. 1987) (right not to be subjected to adverse employment action in retaliation for engaging in protected First Amendment activity).

C. Punitive Damages

Compensatory damages for mental anguish, as well as punitive damages, are recoverable in certain circumstances under § 1981. United States v. Burke, 504 U.S. 229, 240, 119 L. Ed. 2d 34, 112 S. Ct. 1867 (1992) (citing Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 460, 44 L. Ed. 2d 295, 95 S. Ct. 1716 (1975). To recover punitive damages, a plaintiff must show that a defendant (1) intentionally retaliated against him, and (2) did it "with malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a(b)(1).

In Newport v. Fact Concerts, Inc., 453 U.S. 247, 69 L. Ed. 2d 616, 101 S. Ct. 2748 (1981), the Supreme Court held that a municipality (as opposed to an individual defendant) is immune from liability for punitive damages under § 1983. Newport, 453 U.S. at 269-270. A significant part of the Court's reasoning was that deterrence of constitutional violations would be

adequately accomplished by allowing punitive damage awards directly against the responsible individuals. The Court explained:

Moreover, there is available a more effective means of deterrence. By allowing juries and courts to assess punitive damages in appropriate circumstances against the offending official, based on his personal financial resources, the statute [ § 1983] directly advances the public's interest in preventing repeated constitutional deprivations. In our view, this provides sufficient protection against the prospect that a public official may commit recurrent constitutional violations by reason of his office.

Newport, 453 U.S. at 269-270.

Similarly, in Carlson v. Green, 446 U.S. 14, 64 L. Ed. 2d 15, 100 S. Ct. 1468 (1980), the Supreme Court stated that punitive damages would be available in an action against federal officials directly under the Eighth Amendment, partly on the reasoning that since such damages are available under § 1983, it would be anomalous to allow punitive awards against state officers but not federal ones. Id., at 22, and n. 9. See also Adickes v. Kress & Co., 398 U.S. at 233 (Brennan, J., concurring and dissenting); Carey v. Piphus, 435 U.S. 247, 257, n. 11, 55 L. Ed. 2d 252, 98 S. Ct. 1042 (1978); Johnson, 421 U.S. at 460 (punitive damages available under 42 U.S.C. § 1981). Thus, the Court finds that although Montgomery County is immune from punitive damages, the Defendant Commissioners are not afforded such protection.

D. Witnesses

In their Pre-Trial Memoranda, the parties have identified numerous witnesses that they intend to call at trial. Below, the Court finds that these witnesses fit into one of four categories: (1) Relevant; (2) Irrelevant; (3) Cumulative; or (4) Irrelevant and Cumulative. All parties to the action are deemed relevant. Otherwise, those witnesses found to be relevant as to liability or damages are indicated as such. n2 Only witnesses that this Court has found to be relevant as indicated below may be called during trial. All other witnesses are prohibited from being called during this trial absent a renewed proffer acceptable to the Court after all witnesses presently determined by the Court to have relevant testimony have testified.

1. Plaintiff's Witnesses

Regarding the Plaintiff's witnesses as indicated in his Pre-Trial Memorandum, the Court finds as summarized below:

| | |
|---|---|
| Robert E. Wright, Sr. | Relevant, Plaintiff |
| Sheilah Wright | Relevant (L) |
| Mario Mele | Relevant, Defendant |
| Richard Buckman | Relevant, Defendant |
| Joseph Hoeffel | Relevant, Defendant |
| Michael Marino | Irrelevant |
| Oscar Vance | Relevant (L) |
| Nick Melair | Relevant (L) |
| Harry Payne | Relevant (L) |
| William Hannesberry | Irrelevant |
| Victor Depollo | Irrelevant |
| Karen Washington | Irrelevant |

| | |
|---|---|
| Richard Bylar | Irrelevant |
| Patrick Borden | Irrelevant |
| Terrence McMullen | Irrelevant |
| Doug Detwiler | Irrelevant |
| Stephanie Coleman | Irrelevant |
| David Wheeler | Irrelevant |
| John Q. Bingaman | Irrelevant |
| Marvin Pierce | Irrelevant |
| George Schlossher | Irrelevant |
| Charles Nahill | Irrelevant |
| Jay Moyer | Relevant (L) |
| Denise Neuschwander | Relevant (L) |
| Kathy Smith | Irrelevant |
| Bill Hitchcock | Irrelevant |
| Lillian Ritts | Irrelevant |
| Nancy Shearer | Irrelevant |
| Rena Singer | Relevant (L) |
| Ken Delanian | Irrelevant |
| Vincent Cirillo | Irrelevant |
| Marie Kavanaugh | Irrelevant and Cumulative |
| Jon Fox | Relevant (L) |
| Don Polce | Irrelevant and Cumulative |
| Thomas Stone | Relevant (L) |
| Joseph Pizonka | Relevant (L) |
| Harry Massler | Relevant (L) |
| Jim Jerla | Irrelevant |
| Grace DelBono | Irrelevant |
| John Sgarlata | Relevant (L) |
| Jonh DePaul | Relevant (L) |
| Frank Lalley | Irrelevant |
| Dr. Michael Mash | Relevant (D) |
| Dr. William Rodgers | Relevant (D) |
| Dr. Patrick McDonough | Relevant (D) |
| Dr. Harold Byron | Relevant (D) |
| John Markley | Irrelevant |

| | |
|---|---|
| Jane Markley | Irrelevant |
| Rev. Dr. Mickarl D. Thomas | Relevant (D) |

2. Defendants' Witnesses

Regarding Defendants' witnesses as indicated in their Supplemental Pre-Trial Memorandum, the Court finds as summarized below:

| | |
|---|---|
| Frank Aiello | Cumulative |
| Jamesetta Arthur | Cumulative |
| Salvatore Bello | Relevant (L) |
| Beneficial National Bank, corporate designee | Cumulative |
| Patrick Borden | Irrelevant and Cumulative |
| Michael Brescia | Cumulative |
| Richard Buckman | Relevant, Defendant |
| Nora Butler | Irrelevant |
| Dr. Harold Byron | Irrelevant |
| CityBank Credit Card Division, corporate designee | Irrelevant and Cumulative |
| Dr. Gordon Clement | Irrelevant |
| Coastal Federal Mortgage Co., corporate designee | Cumulative |
| Stephanie Coleman | Irrelevant and Cumulative |
| Commerce Bank, | Relevant (L) |

| | |
|---|---|
| corporate designee | |
| Commonwealth Bank, corporate designee | Cumulative |
| CoreStates Bank (d/b/a First Union), corporate designee | Cumulative |
| Lawrence T. Crossan | Relevant (L) |
| Carrie C. Darden | Irrelevant and Cumulative |
| Elsie Darden | Irrelevant and Cumulative |
| General Richard J. DeCarlo | Relevant (L) |
| John DePaul | Relevant (L) |
| Douglas Detwiler | Cumulative |
| Donatucci Kitchens and Representatives thereof | Irrelevant and Cumulative |
| Thomas E. Doran | Relevant (L) |
| Charles Dutill | Cumulative |

| | |
|---|---|
| Gloria Echols | Cumulative |
| Thomas Eichman | Cumulative |
| George J. Flaconiero | Relevant (L) |
| First Tuskegee Bank, corporate designee | Cumulative |
| Dawn Flagg | Irrelevant and Cumulative |
| Sharon Foley | Irrelevant and Cumulative |
| Alphonzo Gallo | Relevant (L) |
| Barbara Gallo | Irrelevant |
| Richard Gallo | Relevant (L) |
| Ruth Gant | Irrelevant and Cumulative |
| G.E. Capital Mortgage Services, corporate designee | Cumulative |
| John Glennon | Irrelevant and Cumulative |
| Robert J. Goral | Cumulative |
| Robert Graft | Irrelevant |
| Edith Hadrick | Irrelevant and Cumulative |
| Barbara Harrington | Cumulative |
| Ann Hartman | Relevant (L) |
| Lynne Hissner | Cumulative |
| William Hitchcock | Irrelevant |

| | |
|---|---|
| Joseph Hoeffel | Relevant, Defendant |
| Jerry Hoff | Irrelevant |
| Gillis Lee Holmes, Sr. | Cumulative |
| Lee Holmes, Jr. | Irrelevant and Cumulative |
| Celeste Jackson | Cumulative |
| James Jerla | Irrelevant |
| Bruce A. Kelley | Cumulative |
| Joseph F. Kuklinski | Cumulative |
| Curtis C. Lindsey, Jr. | Cumulative |
| Dr. Michael Mash | Relevant (D) |
| Dr. Patrick McDonough | Relevant (D) |
| Terrence McMullen | Cumulative |
| Robert McNeil | Irrelevant |
| Nicholas Melair | Relevant (L) |
| Mario Mele | Relevant, Defendant |
| Dr. Timothy Michals | Relevant (D) |
| Philip Montefiore | Relevant (L) |
| Jay Moyer | Relevant (L) |
| Matthew Nahrgang, Esq. | Relevant (L) |
| Denise Neuschwander | Relevant (L) |

| | |
|---|---|
| Robert Neuschwander | Cumulative |
| Sherry O'Rourke | Cumulative |
| Ron Paul | Irrelevant |
| Harry Payne | Relevant (L) |
| Pennsylvania State Trooper Cory Remp | Irrelevant |
| Paul Petrolina | Cumulative |
| Russell Piazza | Irrelevant |
| Marvin Pierce | Irrelevant |
| Barbara Pizonka | Irrelevant and Cumulative |
| Joseph Pizonka | Relevant (L) |
| PNC Bank, corporate designee | Cumulative |
| Thomas Raimondi | Relevant (L) |
| Mark Reichelt | Cumulative |
| Robert J. Reilley, Jr., Esq. | Cumulative |
| Patricia Renzi | Relevant (L) |
| Marianne Rickenbach | Irrelevant |
| Dr. W.H. Rodgers, III | Relevant (D) |
| James Rodgers | Cumulative |
| John M. Ruggiano | Cumulative |
| Keith Sampson | Cumulative |

| | |
|---|---|
| Tina M. Schimony | Cumulative |
| Rénee Scott | Cumulative |
| John Sgarlata | Relevant (L) |
| Dorethea Skinner | Irrelevant |
| Robert P. Stevens | Cumulative |
| Lee Stevenson | Cumulative |
| Samuel Stretton, Esq. | Cumulative |
| Oscar Vance | Relevant (L) |
| James Ward | Cumulative |
| Dr. G.H. Weiss | Irrelevant |
| William Wentz | Irrelevant |
| West Norriton Township Police Sergeant Hallman | Irrelevant |
| David Wheeler | Cumulative |
| James Wright | Relevant (L) |
| Robert E. Wright, Sr. | Relevant, Plaintiff |
| Sheilah Wright | Relevant (L) |
| W. Kirk Wyckoff, or other designee of Progress Bank | Relevant (L) |
| Allison Berl | Relevant (L) |
| Alicé M. Bucha | Relevant (L) |
| Armond Byrd | Relevant (L) |

| | |
|---|---|
| Chevy Chase Bank, custodian of records | Relevant (L) |
| Shirley Christman | Irrelevant |
| Leanora Ciarletta | Irrelevant |
| Joseph Conrad | Irrelevant |
| Ruth S. Damsker | Relevant (L) |
| Arlene S. Davis | Irrelevant |
| Debra DeVitis | Irrelevant |
| Natalie L. DiNolfi | Irrelevant and Cumulative |
| First Union National Bank, corporate designee | Cumulative |
| Neil Granese | Irrelevant and Cumulative |
| William Hanebury | Irrelevant |
| Johns Eastern Co., Inc., custodial of records | Irrelevant |
| Karen Kartanowicz | Irrelevant |
| George Kunin | Irrelevant |
| Gordan Lawrence | Irrelevant |
| Madison Bank | Irrelevant |
| Michael D. Marino | Irrelevant |
| James W. Matthews | Irrelevant |
| Cynthia McClanahan | Irrelevant |
| Detective Sergeant Jeffrey McGee | |

| | |
|---|---|
| James W. McStravick (compliance expert) | Irrelevant |
| Merchants and Businessman's Mutual Ins. Co,. custodian | Irrelevant |
| James Monroe | Irrelevant |
| Barbara J. Morgan | Irrelevant |
| Sharon M. Olszewski | Irrelevant |
| Stephen O'Neill | Relevant (L) |
| Crawford & Co. | Irrelevant |
| Kathy L. Phifer | Irrelevant |
| Debbie Toal et al., custodian of records | Irrelevant |
| Progress Federal Savings Bank, corporate designee | Relevant (L) |
| Lillian Ritts | Irrelevant |
| Nan Ryan | Irrelevant |
| Michael Suray | Irrelevant |
| Joseph Tinaru | Irrelevant |
| Karen Trimble | Irrelevant |
| Robert Trostle | Irrelevant |
| Diane E. Wood | Irrelevant |

An appropriate Order follows.

ORDER

AND NOW, this 20th day of May, 2002, upon consideration of Plaintiff's Pre-Trial Memorandum (Docket No. 52), Defendants' Supplemental Pre-Trial Memorandum (Docket No. 206), and the Motions in Limine filed by the parties as of the date of this Order, IT IS HEREBY ORDERED that all witnesses not found above to be relevant are PROHIBITED from testifying during trial absent a renewed proffer acceptable to the Court after all witnesses presently determined by the Court to have relevant testimony have testified.

BY THE COURT:
HERBERT J. HUTTON, J.

Footnotes

n1 Title VII's § 2000e-2(a)(1) states:

It shall be an unlawful employment practice for an employer - tc fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1).

n2 The Court uses the following abbreviations: (1) "L"

for Liability; and (2) "D" for Damages.

CIVIL ACTION NO. 96-4597

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROBERT E. WRIGHT, SR.

v.

MONTGOMERY COUNTY, et al.

January 23, 2003, Decided

COUNSEL: For Robert E Wright, Sr, PLAINTIFF: Theodore Q Thompson, Ambler, PA USA.

For Montgomery County, Montgomery County Commissioners, Mario Mele, Richard Buckman, Joseph Hoeffel, DEFENDANTS: John M Elliott, Elliott, Reihner, Siedzikowsky and Egan, PC, Blue Bell, PA USA. Eric J Bronstein, Elliott, Reihner, Siedzikowsky and Egan, PC, Blue Bell, PA USA. Timothy T Myers, Elliott, Reihner, Siedzikowsky and Egan, PC, Blue Bell, PA USA.

For Joseph J Pizonka, Barbara Pizonka, MOVANTS: Steven T O'Neill, Wilson, Morrow, Broderick, O'Neill, & Tomkins, LLP, Norristown, PA USA.

For United States of America, MOVANT: Maureen Barden, US Attorney's Office, Philadelphia, PA USA.

JUDGES: HERBERT J. HUTTON, J.

OPINIONBY: HERBERT J. HUTTON

OPINION:
MEMORANDUM AND ORDER

HUTTON, J.

Presently before the Court is Plaintiff Robert E. Wright's Motion for a New Trial (Docket No. 286). For the reasons discussed below, Plaintiff's Motion is denied.

I. BACKGROUND

In this case, Plaintiff, Robert E. Wright, sued Defendants, Montgomery County, Pennsylvania and its County Commissioners, alleging that he was terminated from his position as Director of the Montgomery County Department of Housing Services as a result of employment discrimination. This case was tried before a jury, which ruled in favor of Defendants on June 4, 2002. By way of the instant motion, Plaintiff now seeks a new trial pursuant to Federal Rule of Civil Procedure 59.

II. DISCUSSION

The parameters under which a new trial may be granted are set forth in Fed. R. Civ. P. 59. Rule 59(a) provides, in pertinent part, that:

[a] new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States . . . .

A motion for a new trial may be granted on several grounds, including findings that: (1) the trial court committed prejudicial errors of law; (2) there is newly discovered evidence; and (3) the verdict is against the weight of the evidence. 11 Wright, Miller & Kane, Federal Practice and Procedure Civil 2d, § 2805 (2d Ed. 1995). The decision to grant such a motion rests almost entirely in the discretion of the trial court. American Bearing Co. v. Litton Indus., Inc., 729 F.2d 943, 948 (3d Cir. 1984).

Although not entirely clear from his filings, Plaintiff appears to base his motion on the two grounds. First, he argues that this Court improperly excluded several of his witnesses and other evidence at the trial. Pl.'s Mot. at 1-8. Second, Plaintiff argues that the Court improperly invaded the province of the jury by making credibility determinations about certain witnesses. Pl.'s Supp. Mem. at 7-31. Each of these arguments is discussed in turn below.

A. Excluded Evidence

First, Plaintiff cites numerous instances where the Court excluded witnesses or evidence proffered by him. Plaintiff claims that these rulings "prevented [him] from placing evidence before the jury which would permit them to infer discrimination by the defendants." Pl.'s Mem. at 5. For the reasons discussed below, Plaintiff's arguments must be rejected.

First, by his actions at trial, Plaintiff waived the right to object to any of the witnesses excluded by the Court. Walden v. Georgia-Pacific Corp., 126 F.3d 506, 519 (3d Cir. 1997). As Defendants properly point out, only

definitive rulings on the record regarding the admission or exclusion of evidence may be reviewed for error. See Fed. R. Evid. 103(a). Two elements must exist for an evidentiary ruling to be considered definitive: (1) the party must make an offer of proof regarding the evidence and (2) the Court must make a final ruling deciding whether or not to admit the evidence. Id.; Walden, 126 F.3d at 519.

In this case, however, Plaintiff made no such offer of proof regarding the witnesses that he now claims were improperly excluded. On May 20, 2002, this Court issued a Memorandum and Order providing, in part, that certain of the parties' witnesses were preliminarily excluded on the grounds that the witnesses were either irrelevant, cumulative, or both. See Mem. and Order, May 20, 2002 (Docket No. 251). The Memorandum and Order specifically states that the witnesses were excluded absent a renewed offer acceptable to the Court. Id. At trial, Plaintiff chose not make a renewed offer of proof for any other witnesses listed in the instant motion. Accordingly, he is barred from challenging these exclusions as error. Walden, 126 F.3d at 519 ("Where a district court makes a tentative in limine ruling excluding evidence, the exclusion of that evidence may only be challenged on appeal if the aggrieved party attempts to offer such evidence at trial.") (emphasis in original).

In Walden, the plaintiffs in a Title VII case sought to introduce two statements by the plaintiffs' supervisors. Id. at 516. The trial court held an in limine pretrial evidentiary hearing and issued a tentative ruling that the statements would be excluded. Id. On appeal, the plaintiffs sought to challenge the trial court's exclusion

of the statements. Id. The Third Circuit held that the tentative exclusion of evidence by a trial court could only be challenged on appeal if the aggrieved party attempted to offer such evidence at trial. Id. at 520 (holding that, because plaintiffs failed to make such an offer of proof, trial court's decision was only subject to review for plain error).

Similarly, in this case, the Court issued a tentative ruling excluding some of Plaintiff's evidence. At trial, Plaintiff did not attempt to offer the evidence in question. See June 3, 2002 Tr. at 6. Accordingly, under Walden, Plaintiff waived his right to challenge the Court's ruling on this evidence.

B. Witness Testimony

In his filings, Plaintiff also challenges the manner in which the Court excluded certain witnesses. Pl.'s Supp. Mem. at 7. Specifically, Plaintiff challenges these rulings in two ways. First, he argues that the Court improperly prevented three trial witnesses from testifying on certain allegedly relevant issues. Id. at 13-21. Second, he argues that the Court improperly invaded the province of the jury by altogether excluding the testimony of certain witnesses based on the credibility of those witnesses. Id. at 21-31. For the reasons discussed below, these arguments must also be rejected.

First, Plaintiff claims that the Court improperly prevented three witnesses - Mario Mele, Richard Buckman, and Joseph Hoeffel - from testifying about certain issues at the trial. Id. at 13-21. Initially, this Court notes that the decision to admit or exclude

proffered evidence lies in the discretion of the trial court. Buskirk v. Apollo Metals, 307 F.3d 160, 174 (3d Cir. 2002) (citing Abrams v. Lightolier, Inc., 50 F.3d 1204, 1213 (3d Cir. 1995)). When the trial court applies the proper standard, its decisions are reviewed only for abuse of discretion. Abrams, 50 F.3d at 1213. Under Federal Rules of Evidence 401 and 402, only relevant evidence is admissible. Upon examining Plaintiffs' challenge to the excluded testimony by Mele, Buckman, and Hoeffel, the Court finds that the testimony Plaintiff seeks to offer is irrelevant to the his claim.

Second, Plaintiff contends that this Court improperly precluded several witnesses from testifying at his trial. Pl.'s Supp. Mem. at 21. Plaintiff claims that the Court improperly invaded the province of the jury by basing its ruling on the witnesses' credibility. Id. Curiously, in the same part of his Memorandum, Plaintiff admits that the Court precluded this testimony "based on [the Court's] own determination that the testimony was not relevant or [was] cumulative." Id.

Under the Federal Rules of Evidence 401-403, this precisely describes the Court's role in deciding whether to admit evidence. Federal Rule Evidence 401 defines relevancy. Federal Rule of Evidence 402 states that irrelevant evidence is not admissible. Finally, Federal Rule of Evidence 403 allows the court, in its discretion, to exclude evidence that is prejudicial, confusing, or cumulative.

As Plaintiff himself admits, the Court properly precluded this testimony based on the grounds that is was either cumulative or prejudicial. Accordingly, Plaintiff's motion is denied as to this claim.

## III. CONCLUSION

In the instant motion, Plaintiff moves for a new trial on two grounds. First, he argues that the Court improperly excluded certain evidence. Because Plaintiff failed to offer this evidence at trial, this argument is rejected. Second, Plaintiff argues that this Court erred in excluding certain witness testimony and in precluding other witnesses from testifying at all. Because the Court based these decisions on proper grounds, this argument is also rejected. Accordingly, Plaintiff's motion is denied.

An appropriate Order follows.

## ORDER

AND NOW, this 23rd day of January, 2003, upon consideration of Plaintiff Robert E. Wright's Motion for a New Trial (Docket No. 286), IT IS HEREBY ORDERED that Plaintiff's Motion is DENIED.

BY THE COURT:
HERBERT J. HUTTON, J.

No. 03-1536

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ROBERT E. WRIGHT, SR.,
Appellant

v.

MONTGOMERY COUNTY; MONTGOMERY COUNTY COMMISSIONERS; MARIO MELE; RICHARD BUCKMAN; JOSEPH HOEFFEL; MAILLIE FALCONIERO; GEORGE FALCONERO

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. No. 96-04597)
District Judge: Honorable Herbert J. Hutton

SUR PETITION FOR REHEARfING

BEFORE: SCIRIA, Chief Judge SLOVITER, NYGAARD, ALITO, ROTH, MCKEE, BARRY, AMBRO, FUENTES, SMITH, CHERTOFF, FISHER, and GREENBERG, Circuit Judges

February 6, 2004

The petition for rehearing filed by appellant, Robert E. Wright, Sr., in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the court in regular active service, and no judge who concurred in the decision having asked for

rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for reheaning is denied. Judge Greenberg's vote is limited to denying rehearing before the original panel.

BY THE COURT:

/s/ Morton I. Greenberg Circuit Judge

DATED: February 6, 2004
tyw/cc: Theodore Q. Thompson, Esq.
John M. Elliott, Esq.
Timothy T. Myers, Esq

CIVIL ACTION NO. 96-4597

UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA

ROBERT E. WRIGHT

v.

MONTGOMERY COUNTY

April 15, 2002

AND NOW, this 15th day of April 2002, it is hereby ORDERED that the above-captioned case is SPECIALLY LISTED for trial to commence on May 20, 2002 at 10:00A.M. in Courtroom 9-A, U.S. Courthouse, 601 Market Street, Philadelphia, PA. Trail is expected to last two weeks.

Trial counsel are: Theodore Q. Thompson, Esq.
John M. Elliott, Esq.
Eric J. Bronstein, Esq.
Timothy T. Myers, Esq

Attest:
STEPHEN J. IANNACONE
Deputy Clerk

cc: Cousel
Thomas Clewley